

MONTANA LEGISLATIVE HISTORY

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Chapter 368 1991

Bill H 552 S _____

Original bill & history ☒ C

H. Committee on Business & Econ. Devel.

Hearing Date(s) 2-13 ☒ C

2-14 ☒ C

_____ ☐ C

_____ ☐ C

Date Out _____ ☐ C

S. Committee on Judiciary

Hearing Date(s) 3-18 ☒ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

HOUSE FINAL STATUS

HB 553

	TRANSMITTED TO SENATE		
2/19	FIRST READING		
2/19	REFERRED TO FINANCE & CLAIMS		
3/14	HEARING		
3/20	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/22	2ND READING CONCURRED	48	0
3/23	3RD READING CONCURRED	46	1
	RETURNED TO HOUSE WITH AMENDMENTS		
4/09	2ND READING AMENDMENTS NOT CONCURRED	96	0
4/11	FREE CONFERENCE COMMITTEE APPOINTED		
4/19	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/19	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	100	0
4/20	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	96	2
	SENATE		
4/16	FREE CONFERENCE COMMITTEE APPOINTED		
4/19	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/19	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	49	0
4/20	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	47	0
4/25	SIGNED BY SPEAKER		
4/26	SIGNED BY PRESIDENT		
5/02	TRANSMITTED TO GOVERNOR		
5/17	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 788		
	EFFECTIVE DATE: 5/17/91		

HB 552 INTRODUCED BY CROMLEY, ET AL.

GENERAL REVISION OF BUSINESS CORPORATION LAW

2/01	INTRODUCED		
2/01	REFERRED TO BUSINESS & ECONOMIC DEVELOPMENT		
2/02	FIRST READING		
2/13	HEARING		
2/14	COMMITTEE REPORT—BILL PASSED		
2/16	2ND READING PASSED	92	1
2/19	3RD READING PASSED	99	1
	TRANSMITTED TO SENATE		
2/20	FIRST READING		
2/20	REFERRED TO JUDICIARY		
3/18	HEARING		
3/18	COMMITTEE REPORT—BILL CONCURRED		
3/20	2ND READING CONCURRED	48	0
3/21	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE		
4/03	SIGNED BY SPEAKER		
4/03	SIGNED BY PRESIDENT		
4/03	TRANSMITTED TO GOVERNOR		
4/06	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 368		
	EFFECTIVE DATE: 1/01/92		

HB 553 INTRODUCED BY HARRINGTON, ET AL.

PROVIDE ANNUAL INCREASE TO MONTHLY BENEFITS
FOR TEACHER RETIREMENT SYSTEM

2/01	INTRODUCED
2/01	REFERRED TO STATE ADMINISTRATION
2/02	FIRST READING
2/02	FISCAL NOTE REQUESTED
2/06	FISCAL NOTE RECEIVED
2/07	FISCAL NOTE PRINTED

HOUSE BILL NO. 552

INTRODUCED BY CROMLEY, MEASURE, MAZUREK,
BENEDICT, J. RICE, HARPER

IN THE HOUSE

FEBRUARY 1, 1991 INTRODUCED AND REFERRED TO COMMITTEE
ON BUSINESS & ECONOMIC DEVELOPMENT.

FEBRUARY 2, 1991 FIRST READING.

FEBRUARY 14, 1991 COMMITTEE RECOMMEND BILL
DO PASS. REPORT ADOPTED.

FEBRUARY 15, 1991 PRINTING REPORT.

FEBRUARY 16, 1991 SECOND READING, DO PASS.

FEBRUARY 18, 1991 ENGROSSING REPORT.

FEBRUARY 19, 1991 THIRD READING, PASSED.
AYES, 99; NOES, 1.

TRANSMITTED TO SENATE.

IN THE SENATE

FEBRUARY 20, 1991 INTRODUCED AND REFERRED TO COMMITTEE
ON JUDICIARY.

FIRST READING.

MARCH 18, 1991 COMMITTEE RECOMMEND BILL BE
CONCURRED IN. REPORT ADOPTED.

MARCH 20, 1991 SECOND READING, CONCURRED IN.

MARCH 21, 1991 THIRD READING, CONCURRED IN.
AYES, 49; NOES, 0.

RETURNED TO HOUSE.

IN THE HOUSE

MARCH 22, 1991 RECEIVED FROM SENATE.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

HB 552 IS 240 PAGES LONG. IT IS NOT
PROVIDED AS PART OF THIS LEGISLATIVE
HISTORY.

52nd Legislature

LC 0007/01

Please retain this copy of HB 552.
Due to length, unless major changes
occur, will not be reprinted until
Reference copy.

LC 0007/01

1 *HOUSE* BILL NO. *552*
2 INTRODUCED BY *Conley, Mann, Mayhew*
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE
5 MONTANA BUSINESS CORPORATION LAW; AMENDING SECTIONS
6 15-31-103, 20-5-303, 20-5-313, 33-3-103, 33-3-601, 33-3-602,
7 33-3-603, 33-17-204, 33-31-201, 35-1-515, 35-1-604,
8 35-2-202, 35-5-201, 35-6-104, 35-6-201, 35-9-103, 35-9-201,
9 35-9-205, 35-9-302, 35-9-303, 35-9-305, 35-9-402, 35-9-404,
10 35-9-501, 35-9-504, 35-12-1204, 35-15-201, 35-16-202,
11 35-17-202, 35-17-211, 35-18-203, 35-20-103, 69-14-501,
12 80-12-203, MCA; REPEALING SECTIONS 35-1-102 THROUGH
13 35-1-108, 35-1-110, 35-1-111, 35-1-201 THROUGH 35-1-214,
14 35-1-301 THROUGH 35-1-307, 35-1-401 THROUGH 35-1-411,
15 35-1-413 THROUGH 35-1-415, 35-1-501 THROUGH 35-1-515,
16 35-1-601 THROUGH 35-1-607, 35-1-609 THROUGH 35-1-612,
17 35-1-617, 35-1-711, 35-1-801, 35-1-803 THROUGH 35-1-810,
18 35-1-812, 35-1-901 THROUGH 35-1-912, 35-1-921 THROUGH
19 35-1-927, 35-1-929, 35-1-930, 35-1-1001 THROUGH 35-1-1013,
20 35-1-1015 THROUGH 35-1-1020, 35-1-1025, 35-1-1101 THROUGH
21 35-1-1103, 35-1-1201 THROUGH 35-1-1205, AND 35-1-1301
22 THROUGH 35-1-1306, MCA; AND PROVIDING A DELAYED EFFECTIVE
23 DATE AND AN APPLICABILITY DATE."
24
25

STATEMENT OF INTENT



1 A statement of intent is required for this bill because
2 the secretary of state is authorized to adopt rules
3 prescribing forms and establishing fees. The fees should be
4 established to be commensurate with the cost of the services
5 provided. Existing forms should be modified to the extent
6 necessary to conform to this bill whenever possible. New
7 forms should be as easy to use as possible.
8

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10 NEW SECTION. Section 1. Definitions. As used in
11 [sections 1 through 181], the following definitions apply:

12 (1) "Articles of incorporation" include amended and
13 restated articles of incorporation and articles of merger.

14 (2) "Authorized shares" means the shares of all classes
15 that a domestic or foreign corporation is authorized to
16 issue.

17 (3) "Conspicuous" means written so that a reasonable
18 person against whom the writing is to operate should have
19 noticed it. For example, printing in italics, boldface, or
20 contrasting color or typing in capitals or underlining is
21 conspicuous.

22 (4) "Corporation" or "domestic corporation" means a
23 corporation for profit that is not a foreign corporation and
24 that is incorporated under or subject to the provisions of
25 [sections 1 through 181].

INTRODUCED BILL
HB 552

difficulty finding such a place. He gets upset over the idea that because this is the way it is, this is the way it has to stay. In the early 1980s the voters rejected reimbursing the owners of the liquor licenses for loss and buying them out. Arguments against that initiative said that if there is a problem with the beer and wine quota system, let's let the Legislature address it next time. It has been addressed. If there is a problem, try to find a way to fix it.

HEARING ON HOUSE BILL 552

Presentation and Opening Statement by Sponsor:

REP. BRENT CROMLEY, HD 94, Billings, sponsor explained HB 552 is an act to generally revise the Montana Business Corporation Law, amends a great many sections and provides a delayed effective date and an applicability date. This has been studied for over a year and a half and a lot of input has been received from a variety of interests in the State with a lot of different interests represented. The Act is not to form a new law, but rather to revise the Montana Business Corporation Act. It primarily addresses matters of corporate operation consistent with present practices, also consistent with practices of state, practices of the industry. It most particularly explains and clarifies ambiguities that have been problems in the past; provides for protection of shareholders of small Montana corporations. It is consistent with existing practice and is a clarification measure to a large extent; however, because of its size there may be questions. There are a number of knowledgeable people who have discussed the bill.

Proponents' Testimony:

Steven C. Bahls, Professor of Law at the University of Montana School of Law, Missoula, MT, teaches the business organization courses as well as the agricultural courses. EXHIBIT 8. He explained the background of the bill as well as the objectives of the State Bar's Corporate Law Revision Committee. The Committee consisted of attorneys with diverse backgrounds and corporate counsel for both profit and nonprofit corporations. The Committee published a 268-page report entitled Suggested Revisions in the Montana Business Corporation Act and the Montana Nonprofit Corporation Act. EXHIBIT 9. The Executive Summary of the report EXHIBIT 10 was provided to this Committee. HB 552 is based on the revised model Business Corporation Act prepared by the American Bar Association. The Committee recommended adoption of the proposals for three reasons: (a) to make Montana's law more uniform with the laws of other states, (b) to clarify the Montana law, (c) to modernize Montana law. It seems fitting that the new suggestions of the American Bar Association be adopted since their former suggestions were adopted. One proposal which is HB 552 addresses business corporations, and another proposal addresses nonprofit corporations. These proposals do not deal with such matters as taxation, workers' compensation, labor law

or other revenue issues. Existing articles of incorporation, bylaws or corporate procedures need not be amended. This Act will come into play when there are disputes among the constituencies of the corporation. These revisions have been widely circulated and widely accepted. This bill involves no taxes, no public expenditures, and no sacrifices by any group. An up-to-date business law simply makes it easier to operate a corporation in Montana. Modernization of Montana corporate code produces only winners.

Bob Murdo, attorney in private practice in Helena, Vice Chairman of the Committee mentioned by Mr. Bahls, presented examples of situations where small corporations such as the Mom and Pop corporations, corner grocery store, gas station or any of those other corporate entities that simply run a business in Montana. This law provides more flexibility than the existing law. An example is how an individual capitalizes that corporation. Where does the corporation get its money to start its business. Presently people have to have money in the corporation before they can be a shareholder. Under the new law shareholders can obtain shares for any consideration the directors feel is appropriate - such as future services, promissory notes, future activities to be performed, past services, it isn't just money. As a corporate lawyer that is usually what is done for shareholders. People have the experience and want to do something for the business, but they do not have any money to put into it, yet they want a part of it. The existing law requires money to become a shareholder. The directors may provide that stock may go into escrow until the future services are performed, or they can put restrictions on that stock that say you can't vote certain things or you can't sell that stock until you have provided the services. That is the flexibility and the progress of the law in corporations that have come about in the past 25-30 years.

Another problem example is director conflicts of interests. The director who is a person running and making decisions affecting the finances of the corporation sometimes gets charged with conflicts of interest. Under existing law it is left up to the courts to determine when a conflict of interest exists. Under the proposed legislation there is a specific definition of conflicts of interest in Section 108 and in Section 110 of the Act after the definition is spelled out which requires knowledge by the director of that specific transaction. It defines who the parties to that transaction are and also defines what disclosures that director must make in order to make the action valid. This might have been of concern to anyone serving on a corporate board. This spells out when something has to be said about such a conflict. It provides clarity where the existing statutes are ambiguous.

Also, an important area which might be lacking is flexibility when various shareholders want to do something, such as a merger or sale of substantially all of the assets of a corporation, but under existing law a two-thirds provision in their articles of incorporation or under the existing law requires that two-thirds

of the shareholders approve. Under the new law there is a provision that shareholders can opt out of that two-thirds requirement and go with a simple majority. It provides simpler organizing of appropriations and flexibility to be able to determine that maybe just two people who might own 50% each or maybe 60% for one and 40% for another, would still be able to opt out of the super majority of the two-thirds vote and go for a simple majority vote to sell or merge with another company. An extremely frustrating situation is when shareholders deadlock over important issues. If a deadlock occurs under present law, the remedy is to ask a court to dissolve the corporation. This bill increases the flexibility of a court to make a decision. It authorizes courts to actually change articles of incorporation, change by-laws, change resolutions passed by that corporation; it authorizes courts to prohibit certain acts by shareholders or directors; it authorizes courts also to provide for the purchase of shares at fair market value from a shareholder who doesn't want to go along with that certain type of action. This allows the parties to go to court to resolve such a deadlock without dissolution. These are some of the minor but significant changes brought about from new legislation. He urged support for HB 552.

Robert (Jock) Michelotti, partner in the law firm of Balli, Boyd, Yance, Tulle and Dietrich in Billings, served on the Corporate Law Commission Committee. Derivative proceedings, directors and officers were to be his topics. Derivative proceedings are those actions brought by a shareholder in the name of the corporation against perceived illegal acts by management and directors. The current status of the law is contained in one section of Montana statutes, and primarily the courts are dealing without guidance from the statutes. One case, in particular, addressed issues and derivatives proceeding, but it didn't give clear guidance in the affected proceedings. The proposed law does. It is now the needs of the shareholders to challenge those illegal actions by management, but it provides as well a limitation to prevent unneeded lawsuits and litigation. It requires a written demand be given in all cases to management that a lawsuit is to be commenced, the board then has time to take derivative action. That gives the board the opportunity to review the basis for the suit and make a determination as to whether that suit should be filed and possibly get the corrective action taken and forestall litigation.

It also provides for dismissal of a lawsuit once it is filed, either through the use of a committee or independent board members making inquiry or investigation into the complaint of actions. It also provides in the alternative for a panel to be appointed by court to review these situations so that a suit can be dismissed if there are not proper grounds. Another area addressed is payment of fees and expenses. It provides a method for the court to require either side if it is warranted to pay the fees and expenses, including attorney's fees, for these types of actions. In addition it provides for the court to notify shareholders, if necessary, of any discontinuance or settlement

of lawsuit, so that if interested shareholders are affected, they will be notified of the intentions to consider as to whether their interests are such that the lawsuit should not be dismissed or settled.

As far as directors and officers, the key issues there are that it clarifies and amplifies. The bill is more of a clean-up type of bill with respect to those areas. Some of the areas that are covered are that normally the bylaws will fix the size of the board of directors and reserve to the shareholders the right to amend the number of directors. If the bylaws do not provide that, this bill gives the directors the opportunity to adjust the size of the board of directors by a 30% amount. The intention is to give them some leeway and to preserve the shareholders right to name directors and fix the number of directors and keep control in the shareholders.

This bill provides for a procedure whereby directors can resign. Current law has no provision for resignation of directors. HB 552 also allows for judicial proceedings to be taken to remove directors. The reason is there is no comparable MCA section right now. In the case of directors or shareholders who have a majority interest in a corporation it is not possible to remove those directors under current law. This bill gives shareholders opportunity to seek removal if need be.

Meetings can be conducted through electronic means under HB 552. Modern day technology conference calls can be conducted. It also allows for the appointment of committees. Many businesses nowadays do work by committees and this bill will allow them to do that. With respect to officers, the status of the law is that certain officers, president, vice president, secretary-treasurer are required. This law allows the directors to determine which officers are necessary and appoint those officers. It does not require all of those offices to be maintained. It also eliminates the prohibition that the president and secretary not be the same person. Officers' standards of conduct codify existing case law and it requires officers to be subject to the same courses of conduct under which the directors are placed. With respect to indemnification, this law does not change the existing statute, it just reorganizes it. Those are the key areas he wished to speak to. He urged support of HB 552.

Garth Jacobson, Secretary of State's office, said this is the product of countless hours of work. HB 552 does many things for many people. It impacts the Secretary of State's office in the way businesses interact with that office. The focus of his participation on this Committee and that of the Secretary of State's office has been toward minimizing the red tape businesses face in dealing with the State of Montana, particularly with the Secretary of State's office. This bill truly makes the conduct of business in Montana and the interaction with the Secretary of State's office much easier. There are three areas affecting the Secretary of State's office: One is the filing process which has

been simplified and clarified. An example is that if you want to dissolve your corporation, under present law you have to file a notice of intent to dissolve and file your articles of dissolution. Under the proposed law you only file once saving time and energy. Another area that is simplified is the fee structure. Under present law you have to consider the par value of the stock, the number of shares to be issued. You go through the formula and analysis to determine what the fees are going to be. The new proposed law sets a fee structure that establishes an average amount per share, and it is quick and easy to identify the amount it is going to cost to file your articles of incorporation. The filing fees, as compared to the license fees, will always remain the same as shown on the first page of the bill in the statement of intent. Those fees will be commensurate with the costs. No profit will be made from the business entities filing their documents. They will remain the same. The license fee has been clarified and simplified so it is very easy to understand. There is no revenue impact insofar as there will be no increase or decrease in the amount of money received by the State.

There is a slight difference in the foreign process of filing. It has been made simpler by specifying it is no longer necessary to submit original articles of incorporation; only a statement that is certified by the Secretary of State's office in the state of incorporation that they are in existence and in good standing with their application and an authority to operate in the State of Montana may then be issued.

Another major area that has been a major problem for the Secretary of State's office is the name disputes. Entities that want to incorporate must have a clearly distinguishable name that is clearly distinguishable and not deceptively similar to another business entity in Montana. That name standard is changed to be distinguishable on the records which will permit more filing of business names or corporate names with their office. One exception is that if someone tries to use a name that is deceptively similar to another business entity, a method is provided to resolve this type of dispute. This is an extremely important aspect of this bill. It works in Minnesota.

Service of process on corporations is presently done by the Secretary of State's office. There are many ambiguities on how to serve process on dissolved corporations. It has definitely been made very clear as to who you serve and how you serve. These types of provisions are extremely important and they make it easier to operate in Montana. His recommendation is that HB 552 do pass.

Mike Zimmerman, counsel for Montana Power Company, said MPC was represented by Ms. Karla Gray who worked on this Commission and they did participate in fourteen changes made in this legislation.

Bob Pyfer, appeared as a member of the Montana Bar Association Corporate Law Review Committee. He wished to lend his support to this bill and attest to the many state and national hours spent working on this legislation. He will address the nonprofit corporation bill next week. A lot of what was being said today about corporate government flexibility, etc., other than the aspects relating to capital, etc. applies to the nonprofit act as well as the for-profit act. They will not duplicate that testimony on Monday.

Katherine Donnelley, attorney at Browning, Kaleczyc, Berry & Hoven, Helena, believes the proposed provisions will benefit their corporate clients, and supports the bill.

Opponents' Testimony: None

Questions from the Committee:

REP. SONNY HANSON said from what has been stated, this really gives the judges more control over the individual corporations, and can in effect force decisions. In Section 146 a judge can dictate what they end up paying on a vote. Is the general intent of this bill to put more authority in the judges? Rather than judging the issue, they can make their decision and force 'cram downs', occurring in bankruptcies, etc. Mr. Bahls didn't think this gave judges more control. In fact the provisions of this bill come into play primarily when parties are in force already. Take a family farm situation where a shareholder works on the farm, and a shareholder works off the farm, and they can't see eye to eye on dividend and other matters. Currently those shareholders will proceed in court if they have disagreements and ask the judge to decide. Under the existing law the statute says the judge, if he finds one shareholder is oppressive, should dissolve the corporation. Under the new law in addition to dissolving the corporation, the irritant can be removed, that is, the bylaw section can be removed or nullified or require payment of dividends, the board of directors can be required to hold a meeting to resolve these issues. It gives judges more discretion, but there aren't going to be more matters in court as a result of this legislation. It gives judges more alternatives and discretion when matters are in court. In terms of the threshold of what the court can do, it does not give more discretion to the judges.

Attorney's fees with respect to the derivative actions, are under existing law. The existing statute addresses attorney's fees. That is when the attorney's fees are to be awarded to the corporation if the plaintiff has brought a frivolous action, or when the attorney's fees are to be awarded to the plaintiff because the plaintiff is representing a corporation benefiting all shareholders. This law simply sets forth standards. This proposal actually increases certainty. Now legal standards are known and how a judge is going to make that decision, and what power the judge has.

REP. HANSON asked what happens to all case law on this? The change seems so massive here that in effect it is starting over from zero. There are a lot of questions that are not resolved. Mr. Bahls feels this would not be starting from ground zero with respect to case law in this regard. The 200-plus page report identifies Montana cases which deal with the Business Corporation Act; identifies virtually all those Montana cases according to the report that are consistent with this legislation. There are a few cases that are clarified and are simply ambiguous. There is very little Montana Supreme Court law relating to corporate governance compared to other states. By keeping current, this allows the Montana Supreme Court on issues they have not spoken to before to invoke the law of other states because Montana law will be similar to that of other states. Furthermore, the official American Bar Association and the State Bar Committee comments ought to provide some guidance. There is one case where there is substantial clarification that is on derivative action, the SW case which is cited in the report, but there is no substantial impact on any other such cases.

REP. HANSON further asked how many other states have adopted something in this general form with their own modifications? Mr. Bahls said 35 states have adopted the ABA Model Business Corporation Act. About half of those have adopted updates or something very similar. Most of the other half are in the process Montana is in.

REP. HANSON mentioned Section 179 deals with additional filing for corporations. Mr. Jacobson advised that is pretty much verbatim from the existing law. The Secretary of State's office sends out forms to corporations for their annual reports asking if everything is the same. The filing fee is paid and the form returned to the Secretary of State's office. If any changes have been made in the corporation, they are shown on the preprinted form. This is just to keep the corporation alive. The provisions for foreign corporations is the same as for Montana corporations. All provisions are the same except for the requirement that officers should be named in the reports.

REP. ELLIS said there are provisions in the new law that would allow a court to decide when the majority of the stockholders wanted to do something and maybe only one person disagreed. He wanted an example. Mr. Bahls explained this particular provision deals with the ability of the court to intervene on the side of a minority shareholder owning less than 50% of the stock, if in fact, the conduct of the majority shareholder is determined by the court to be oppressive. Under existing law, if the conduct of the majority shareholder is oppressive, the court has one option according to the statute, and that is to dissolve the corporation. Under the new statute there are many options, perhaps to restructure the board of directors, buy out the other shareholders. An example would be from Montana case law a few years ago. The Supreme Court was faced with the problem of a family farm corporation where a majority shareholder refused to

keep books and records separate from his personal business and the other business and used corporate assets for personal purposes. The court will only intervene under the new legislation, as under Montana existing law, if there is a finding that one shareholder acted in a manner which was oppressive, so the court can't come in and second guess decisions, but needs to find something almost fraudulent in order to get into it in the first place. That section of the code is Section 155.

REP. STEPLER said on page 70 testimony about bringing family members into corporations is under what section? Mr. Bahls said that section relates to contribution of assets to the corporation, issuance of shares is Section 38. That privilege applies not only to family members, but also to nonfamily members.

REP. STELLA JEAN HANSEN asked how a corporation is set up; also is a system for selling stock in that section? Mr. Bahls said the Secretary of State's office has indicated that should this legislation become law, there would be an assembly of a packet of material for individuals interested in incorporating to set forth in layman's language how this is done. The system relating to issuance of shares is addressed in Sections 33 through 48. The heart of that section is at Section 38 of the statute. The Montana Securities Commissioner also has a separate regulatory scheme for selling stock to the public.

REP. STEPLER asked for further information about being able to opt out without two-thirds approval. Mr. Bahls explained the State of Montana has traditionally required a two-third vote of shareholders for major corporate action such as mergers, sale of substantially all of the assets. That is out of tune with the modern trend. In most states approval of one-half of the shareholders is necessary. The Committee believed that this has been an historical tradition in Montana and should not be changed. There may be investors in family corporations or other corporations that have invested thinking that one-third of them effectively would be able to block a change, so they didn't want to eliminate that from the law. But new corporations can elect to have an approval by a bare majority; for existing corporations two-thirds of them can elect to have a majority approval scheme. You need to get two-thirds of the votes so no one's rights are jeopardized. That is a provision of the law that is not in the ABA Act which suggests that it should be a flat majority vote. That was resisted because people may have invested on the assumption that one-third could block a specific action.

REP. WALLIN was wondering why we are hearing this kind of a law. There are no opponents. Were there any disagreements when this was put together by the Commission? Mr. Bahls thought there were no opponents to HB 552 because they identified and addressed all opposition last summer and fall. There were some suggestions that they did not address, one of which was to throw out the Workers' Compensation system and reduce business taxes. There probably are

no opponents because it could be categorized as a housekeeping bill. This is simply bringing legislation up-to-date. Any controversial matters have been eliminated. There was substantial debate within the Committee to try to extend some of the benefits to banks. It was decided from the banking community should request that change. What was known as anti-takeover legislation was hotly debated. That was the question of whether corporations should be protected from takeovers. It was decided that anything controversial should not be packaged with this bill; that it should be a housekeeping bill. The Committee couldn't agree whether they should have an anti-takeover bill or not, so as a result that is not an integral part of this legislation. REP. WALLIN said they do have that in the Senate.

REP. ELLIS asked if he had said the current stockholders could decide to liberalize their own bylaws so that in future times one-half could litigate major corporate decisions? Mr. Bahls thinks that current stockholders ought to have maximum flexibility to set forth rules relating to their own relationship so they can liberalize if they so agree by a two-thirds vote.

Closing by Sponsor:

REP. CROMLEY closed saying this is a large, important measure. The many sections shown in the Title of the bill will be recodified. There are a lot of laws which are being repealed as a result, but it is not a major change of practices, and not many changes in legislation. It is very significant that there were no amendments proposed.

REP. RICE stated HB 258, HB 541, HB 590 would be heard tomorrow, February 14. The Committee would meet at 7:15 a.m. for executive action.

ADJOURNMENT

Adjournment: 10:50 a.m.



BOB BACHINI, CHAIRMAN



JO LAHTI, SECRETARY

BB/jl

HOUSE OF REPRESENTATIVES

BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE

ROLL CALL

DATE Feb. 13, 1991

[illegible]

TESTIMONY OF STEVEN C. BAHLS

Professor of Law
University of Montana School of Law
Missoula, MT 59812

Exhibit # 8
EXHIBIT 8
DATE 2-13-91
HB 552

before the
HOUSE BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE
on February 13, 1990
in support of
House Bill 552
(An Act Generally to Revise Montana Business Corporation Act)

For the last 18 months, I have had the pleasure of chairing the State Bar's Corporate Law Revision Committee. The Committee has prepared two legislative proposals concerning corporate governance. We believe that these proposals will improve the business climate in Montana at no cost to the taxpayer. One proposal addresses business corporations and the other proposal addresses nonprofit corporations.

The bill before you addresses business corporations. The related nonprofit corporation bill will be before you soon. Corporate governance issues primarily deal with the relationship between a corporation and its owners, directors and officers. In addition, corporate governance issues, to a more limited extent, deal with the relationship between a corporation and state government (particularly the Secretary of State) and with the relationship between the corporation and creditors (particularly upon the dissolution of a corporation). The proposals do not deal with issues outside corporate governance such as taxation, workers compensation or labor law.

I would like to spend the next few minutes discussing the background of the bill, as well as the objectives of the Committee that drafted the bill.

In the summer of ¹⁹⁸⁹~~1990~~, the then president of the State Bar of Montana appointed the Corporate Law Revision Committee. The Committee was appointed to respond to the need to update and clarify Montana business corporation laws. The Committee consists of a diverse and nonpartisan group of lawyers from private practice, government, and academia, as well as corporate counsel for both a profit and nonprofit corporation.

The Corporate Law Revision Committee held five all-day meetings during 1989 and 1990 to discuss strengths and weaknesses of the existing corporate law. The Committee hired two research assistants to research various options.

On June 30, 1990, the Committee released a 262-page Exposure Draft of its proposed legislation, which included comments relating to the proposed legislation. The Committee widely circulated the Exposure Draft among members of the Bar, government agencies and the business community. The Committee solicited comments from each of these groups. Based on these comments, the Committee on October 24, 1990 published a 268-page report entitled Suggested Revisions in the Montana Business Corporation Act and the Montana Nonprofit Corporation Act. In December 1990, the Board of Trustees of the State Bar of Montana unanimously agreed to recommend the legislation described in the Report. Although the Legislative Council made minor changes, House Bill 552 contains the changes to the Montana Business Corporation Act recommended in that Report. I

am providing the Committee with a copy of that Report, as well as the Committee "Executive Summary" of the legislation. Please note that the full Report contains an analysis of each pertinent section of House Bill 552.

By the time the Committee completed its work late last year, it is estimated that in excess of 1000 hours were invested in the project. We are pleased to have the opportunity to present it to you today.

House Bill 552 is based largely on the Revised Model Business Corporation Act (1984) prepared by the American Bar Association Committee on Corporate Laws ("the ABA"). The Committee recommends ABA models for three reasons. First, the nation's foremost legal experts, after five years of study, prepared the ABA Model Business Corporation Act. The American Bar Association widely circulated the proposal among the business community for comments in 1983. After the proposals were revised to address the issues raised by the comments, the American Bar Association finalized the ABA Model in 1984. Second, about twenty-five years ago, this legislature adopted earlier versions of the law. As such, it makes sense to adopt the ABA's Revised Model Business Corporation Act in Montana. Third, the ABA has supplemented its Model Business Corporation Acts with four volumes of Official Comments and Annotations. These supplemental materials are extremely useful when applying the legislation.

The legislation is quite lengthy in that it entirely restates the law concerning corporate governance. Because Committee members will summarize

the salient provisions of the bill; I thought would spend a few minutes talking generally about the objectives of the bills.

The objectives of the Bar's proposals are threefold: (a) to make Montana's law more uniform with the laws of other states, (b) to clarify the Montana law, (c) to modernize Montana law.

Uniformity. The Bar's proposals will make Montana's law more uniform. The ABA's Model Business Corporation Act has been the basis for the Corporation Act in thirty-five states. Most of those states have adopted, or are in the process of adopting, the updated revised acts. Some states, such as Delaware, have sought to become "corporate havens" by adopting comprehensive, unambiguous legislation concerning corporate governance. Because the ABA's Revised Acts allow corporations the same comprehensive and unambiguous legislation, adoption of this legislation means corporations will have a reduced incentive to incorporate out of state. Uniformity in state laws also has the advantage of reducing costs for Montana corporations operating in more than one state. Uniform laws reduce the need to learn another regulatory scheme.

The State Bar's proposal does not blindly adopt the ABA's suggestion. Instead, the Committee has modified the ABA's suggestions, in places, to address properly the need of a typical, small Montana corporation. For example, the Committee included proposals to give courts mechanisms to resolve disputes between owners of small businesses. Likewise, The Committee modified the

ABA's proposals to respect certain Montana corporate law traditions such as cumulative voting.

Clarifying Montana's Law. The current corporate governance rules contain ambiguous provisions making it difficult for corporations and their constituents to know and understand their rights. Ambiguous provisions in the corporate law make transactions unnecessarily expensive and leads to burdensome litigation. During the 1980s, for example, the Montana Supreme Court has heard and decided numerous cases based on lawsuits that might have been avoided if the corporate laws had been clear.

Several ambiguities are resolved by the bill:

- The bill clearly specifies when shareholders or members may bring suits, in the name of the corporation, for damages as a result of actions taken by directors. It strikes a reasonable balance between competing considerations of discouraging litigation brought solely for its settlement value, while protecting the rights of shareholders to assert reasonable claims.
- The bill identifies when a transaction entered into with a director is a conflict of interest and states the consequences of those transactions. Until now, what amounted to a conflict of interest was unclear.

- The bill identifies when and how a creditor of a corporation may recover against the assets of a corporation when it is dissolved.
- The bill clarifies the rights of shareholders who, at the hands of other unscrupulous shareholders, have been frozen out of participation in the corporation. Montana case law has long struggled with this ambiguity.
- The bill clarifies the rights of existing shareholders to purchase unissued stock.
- The bill clarifies when the Secretary of State must file a document.

Modernization of the Law. Modernization of the law provides Montana corporations with the same benefits provided in other states. While the original Montana Business Corporation Act adopted in the 1960s was adequate then, it has not kept up with the evolution of the business corporation law in other states. House Bill 5⁵22 achieves these objectives.

- Needless formalities and needless filings with the secretary of state are abolished.

- The legislature expressly gives courts the authority to order remedies less severe than dissolution of a corporation when shareholders are deadlocked.
- The bill increases the ability of shareholders of a corporation to structure their relationship as they wish. As such, the law allows shareholders to agree to eliminate cumbersome provisions such as cumulative voting and clarifies when shareholders may agree that directors, acting in good faith, will be immune from shareholder suits.
- The bill provides an inexpensive, convenient procedure to contest a corporate name that is confusingly similar to another.
- The bill makes it easier to bring members of the family into a corporation by allowing family members to become shareholders by contributing future services or promissory notes for stock.

Enactment of the proposals will not burden corporations. Articles of incorporation need not be amended or refiled. Existing bylaws and corporate procedures need not be amended. The State Bar's Corporate Law Revision Committee has circulated its proposal to corporate lawyers, business groups and government officials. The reaction has been favorable.

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Some might argue that adopting up-to-date corporate codes is not much more than necessary housekeeping. Keeping the house in order, however, will provide tangible benefits to Montana corporations, their shareholders, creditors, officers and directors, at no cost to the state. Bills designed to improve business climate often involve vexing tax issues, involve substantial public expenditures, or allows some Montanans to gain at the expense of another. This bill, however, involves no taxes, no public expenditures, and involves no sacrifice by any group. An up-to-date business corporation act simply makes Montana an easier place to operate a business. Modernization of Montana corporate code produces only winners!

CORPORATE LAW REVISION COMMITTEE

STATE BAR OF MONTANA

EXHIBIT 9
DATE 2-13-91
HB 552



SUGGESTED REVISIONS

IN THE

MONTANA BUSINESS CORPORATION ACT

(MCA TITLE 35, CHAPTER ONE)

AND THE

MONTANA NONPROFIT CORPORATION ACT

(MCA TITLE 35, CHAPTER TWO)

* * * * *

October 24, 1990

Steven C. Bahls, Reporter

Exhibit # 40

EXECUTIVE SUMMARY

HOUSE BILL 552
STATE BAR OF MONTANA
CORPORATE LAW REVISION PROJECT

EXHIBIT 10
DATE 2-13-91
HB 552

Steven C. Bahls, Missoula, Chair
Robert Murdo, Helena, Vice Chair
Karla Gray, Butte
Garth Jacobson, Helena
Bruce MacKenzie, Great Falls
Robert G. Michelotti, Jr., Billings
Robert Pyfer, Helena
Jeff Pence, Bozeman
Bob Goodale, Circle

House Bill 552 was drafted by the Corporate Law Revision Committee of the State Bar of Montana. This Executive Summary discusses the drafting process and the material provisions of the bill.

BACKGROUND OF THE PROJECT

On July 7, 1989, Gary Spaeth, President of the State Bar of Montana, appointed a special Corporate Law Revision Committee. The objective of the Committee was "to review Montana's corporation statutes and to propose to the 1991 Legislature necessary and desirable revisions aimed at providing the business community up-to-date and unambiguous laws addressing corporate governance."

The Committee, in accordance with its charge, limited its review to matters of corporate governance. Corporate governance issues are currently addressed in Chapter One of Title 35. Corporate governance issues primarily deal with the relationship between a corporation and its owners, directors and officers. In addition, corporate governance issues, to a more limited extent, deal with the relationship between a corporation and state government (particularly the secretary of state) and creditors (particularly upon the dissolution of a corporation). As such, the Committee did not examine taxation, workers' compensation and other issues outside the scope of corporate governance.

The membership of the Committee was a broad spectrum of attorneys including those in private practice and those employed by government, a nonprofit organization, private industry and academia. Committee members had expertise in all aspects of corporate governance including closely held businesses, publicly held businesses and nonprofit organizations. The expenses of the Committee were generously funded by the State Bar, the University of Montana School of Law, the Secretary of State and private business. The Committee members' employers have generously provided the services of the Committee members.

The Committee members have met numerous times since their appointment, reviewing the American Bar Association's Revised Model Business Corporation Act and legislation from various states. The Committee took into consideration the interests of shareholders, investors, directors and management, as well as the interests of the State of Montana and its citizens.

The Committee circulated an Exposure Draft on June 30, 1990 to attorneys, businesses, trade associations, government agencies and government officials having an interest or stake in the proposals. A summary of the proposal was published in the May 1990 edition of the *Montana Lawyer*. The comments received were favorable. After making a few revisions in response to comments received from the Committee members or those responding to the Exposure Draft, the Committee finalized the proposal. The final proposals are contained herein. This proposal is unanimously recommended by the Committee. The proposals are unanimously adopted by the State Bar's Board of Trustees in December 1990.

HISTORY OF THE ABA MODEL ACTS

The Bar's proposals are based largely on the Revised Model Business Corporation Act (1984).

The RMBCA is the first complete revision of the Model Act in more than thirty years. Thirty-five states (including Montana) have adopted earlier versions of the Act, and several have already adopted the RMBCA. The RMBCA was drafted by the ABA's Committee on Corporate Laws, comprised of leading national corporate law experts. Exposure drafts of that Act were widely circulated nationally.

Because the Bar recommends staying with the ABA Model Acts, existing forms of articles of incorporation now on file need not be amended. Similarly, attorneys and the business community need not learn a new statutory scheme. The basic principles applicable to corporations remain largely unchanged.

ADVANTAGES OF PROPOSED REVISIONS TO THE MONTANA BUSINESS CORPORATION ACT

The objectives of the proposals were threefold: (a) to standardize, (B) to clarify, and (c) to modernize the law relating to corporate governance.

The majority of the changes proposed by the State Bar are designed to clarify the law. While the Montana Supreme Court, on the whole, has done an admirable job in clarifying the existing statutes, additional clarity in the statutes has several advantages. First, a few of the court cases are outdated and it is uncertain whether the Court would follow the modern trend, if presented with these cases again. Second, attorneys and corporate officials ought to be able to ascertain the law with some certainty by referring to the statute. Finally, the Supreme Court has not had the opportunity to rule on the majority of the ambiguities in the existing statutes, further increasing the uncertainty in existing law.

Among the more significant clarifications in the proposal are:

a) *Derivative Shareholder Suits*. Existing law in Montana does not clearly address the conditions under which shareholders may bring a suit, in the name of the corporation, for damages as a result of actions taken by directors. The proposed revisions provide specific guidance to corporations, attorneys and the courts.

b) *Duty of Loyalty*. Existing law providing that director conflict of interest transactions are void or voidable leaves too much to the imagination (and the courts). The proposed revisions provide needed guidance

to corporate directors in defining exactly what transactions are conflict of interest transactions and defining the consequences to the parties to those transactions.

c) *Dissolution.* The ability of injured plaintiffs to recover against the assets of a dissolved corporation is not clear under existing law. In some cases, plaintiffs may be left without a remedy if a product is manufactured before dissolution but causes injury thereafter. The State Bar proposes a scheme to protect the interests of injured parties while at the same time protecting the interests of shareholders in winding up the affairs of corporations.

d) *Preemptive Rights.* Many corporations elect to provide for preemptive rights (rights of existing shareholders to purchase a prorata amount of any new stock issue) in their Articles of Incorporation. When a corporation elects preemptive rights, it is not always clear when these rights apply. The proposed legislation provides a definition.

e) *Service of Process.* The current statute does not "mesh" well with the Montana Rules of Civil Procedure concerning the issue of service of process on a dissolved corporation. The revisions clarify who may be served.

f) *Housekeeping.* The State Bar's proposals, throughout, clarify ambiguities in existing law, eliminate unnecessary technical requirements and provide for maximum flexibility in structuring a corporation. The proposals also clarify existing sections of the law that are difficult to read, and, as such, create traps for the unwary (e.g., indemnification of directors, dissenters' rights).

In addition, several provisions of the act modernize Montana law relating to corporate governance. In doing so, the legislation affords Montana corporations with the same advantages as businesses incorporated in other states. The legislation, however, balances the rights of those involved in corporate management with the rights of shareholders and creditors. Some of the more significant changes include

a) *Elimination of Needless Formalities.* The proposals seek to simplify corporate governance by eliminating needless formalities. For example, the two-step filing procedure for dissolution has been reduced to one step and the requirement of two persons acting as corporate officers has been eliminated.

b) *Shareholder Dissension.* The existing statute provides for the draconian remedy of dissolution of a corporation if a court finds majority shareholders oppressing minority shareholders. Oppression has been defined by the courts as violation of the reasonable expectations of shareholders. The State Bar, borrowing from a South Carolina statute, recommends adoption of a statute providing that courts have the power to order less drastic remedies, such as court-ordered purchase of shares or injunctions prohibiting certain wrongful acts.

c) *Consideration for Stock.* The proposed legislation changes existing law by allowing corporations to issue stock for any consideration deemed appropriate by the directors, including promissory notes or future services.

d) *Dissolution.* The existing law cuts off the rights of injured parties to sue dissolved corporations for damages, even though the applicable statute of limitations may not have expired. It does so, by establishing a special dissolved corporation statute of limitations, which, in effect, supersedes the regularly applicable statute of

limitations. The proposal abolishes the separate statute of limitations for dissolved corporations (whether foreign or domestic), leaving the otherwise applicable (e.g. tort statute of limitations, contract statute of limitations) statute of limitations to control.

e) *Increased Flexibility.* The current laws require cumulative voting, affirmative vote of two-thirds of the shareholders to take certain major corporate action and other provisions that, while appropriate for many corporations, are unnecessarily cumbersome for others. The proposal allows shareholders to opt out of these requirements if they so desire.

f) *Limitation of Director Liability.* Many states allow shareholders to amend articles of incorporation to give directors greater protection from liability to the shareholders or the corporation. The proposal clarifies that shareholders may adopt such limitations unless the directors acted intentionally in inflicting harm on the corporation.

g) *Incorporation.* The proposed revisions simplify and clarify the incorporation process. The law reduces the information required in the articles and reduces the amount of review by the Secretary of State (thereby eliminating potential delay).

h) *Alternative Dispute Resolution for Name Disputes.* The proposed legislation provides a simplified procedure for parties injured by a subsequently filed name, causing confusion, mistake or deception among the public. Under existing law, an aggrieved party must sue in state court under complex theories of unfair competition or other unclear and cumbersome common law theories.

The law should be simplified to eliminate needless paperwork and cumbersome computations. As such, the State Bar proposes the filing process simplify documents to be filed and eliminate the necessity of the issuance of "certificates" to acknowledge filing. For example, the cumbersome dual filing procedure for dissolution of a corporation has been simplified to require only one comprehensive filing.

Similarly, the cumbersome requirement of computing initial license fees for both domestic and foreign corporations has been simplified. Now based on the amount of stock issued and the par value of the stock, the fee structure has become a "trap" for the unsophisticated. Those corporations issuing high par value stock pay more fees than those issuing non par stock or low par value. Instead, under the fee scheme proposed by the State Bar, the fees are flat fees.

In addition, the language of several provisions of the existing law is cumbersome and difficult for many members of the business community to understand. The statutory sections regarding indemnification and dissenters rights are examples. This language has been simplified.

Finally, uniform and standardized filing requirements have been recommended.

EXECUTIVE SUMMARY

THE CORPORATE LAW REVISION PROJECT

BACKGROUND OF THE PROJECT

On July 7, 1989, Gary Spaeth, President of the State Bar of Montana, appointed a special Corporate Law Revision Committee. The objective of the Committee was "to review Montana's corporation statutes and to propose to the 1991 Legislature necessary and desirable revisions aimed at providing the business community up-to-date and unambiguous laws addressing corporate governance."

The Committee, in accordance with its charge, limited its review to matters of corporate governance. Corporate governance issues are currently addressed in Chapter One and Chapter Two of Title 35. Corporate governance issues primarily deal with the relationship between a corporation and its owners, directors and officers. In addition, corporate governance issues, to a more limited extent, deal with the relationship between a corporation and state government (particularly the secretary of state) and creditors (particularly upon the dissolution of a corporation). As such, the Committee did not examine taxation, workers' compensation and other issues outside the scope of corporate governance.

The membership of the Committee was a broad spectrum of attorneys including those in private practice and those employed by government, a nonprofit organization, private industry and academia. Committee members had expertise in all aspects of corporate governance including closely held businesses, publicly held businesses and nonprofit organizations. The expenses of the Committee were generously funded by the State Bar, the University of Montana School of Law, the Secretary of State and private business. The principal expense of the Committee has been copying costs and student research assistants. The Committee members' employers have generously provided the services of the Committee members.

The Committee members have met numerous times since their appointment, reviewing the American Bar Association's Revised Model Business Corporation Act, Revised Model Nonprofit Corporation Act and legislation from various states. The Committee took into consideration the interests of shareholders, investors, directors and management, as well as the interests of the State of Montana and its citizens.

The Committee circulated an Exposure Draft on June 30, 1990 to attorneys, businesses, trade associations, government agencies and government officials having an interest or stake in the proposals. A summary of the proposal was published in the May 1990 edition of the *Montana Lawyer*. The comments received were favorable. After making a few revisions in response to comments received from the Committee members or those responding to the Exposure Draft, the Committee finalized the proposal. The final proposals are contained herein. This proposal is unanimously recommended by the Committee.

HISTORY OF THE ABA MODEL ACTS

The Committee's proposals are based largely on the Revised Model Business Corporation Act (1984) and the Revised Model Nonprofit Corporation Act (1987) prepared by the American Bar Association. Both the Montana Business Corporation Act and the Montana Nonprofit Corporation Acts are based on earlier versions of the ABA Model Acts.

✓ The Revised Model Business Corporation Act (1984) (RMBCA). The RMBCA is the first complete revision of the Model Act in more than thirty years. Thirty-five states (including Montana) have adopted earlier versions of the Act, and several have already adopted the RMBCA. The RMBCA was drafted by the ABA's Committee on Corporate Laws, comprised of leading national corporate law experts. Exposure drafts of that Act were widely circulated nationally.

✓ The Revised Model Nonprofit Corporation Act (1987) (RMNCA). The RMNCA is the first complete revision of the ABA's Nonprofit Corporation Act since 1964. The drafters of the RMNCA used, as their starting point, the California Nonprofit Corporation Act. The ABA's Subcommittee on Model Nonprofit Corporation Law, composed of leading experts in the area of nonprofit corporations, circulated over one thousand copies of their exposure draft to nonprofit organizations, the IRS, academics, accountants and others. The ABA proposals were finalized and adopted in whole or in part by some jurisdictions. Other states are considering the law. See Hone, *Aristotle and Lyndon Baines Johnson: Thirteen Ways of Looking at Blackbirds and Nonprofit Corporations -- The American Bar Association's Revised Model Nonprofit Corporation Act*, 39 CASE W. R. L. REV. 751 (1988). See generally Moody, *The Who, What and How of the Revised Model Nonprofit Corporation Act*, 16 N. KENT. L. REV. 251 (1988).

The RMNCA is parallel to the RMBCA, except where there are policy reasons to depart from the RMBCA scheme.

Because the Committee recommends staying with the ABA Model Acts, existing forms of articles of incorporation now on file need not be amended. Similarly, attorneys and the business community need not learn a new statutory scheme. The basic principles applicable to corporations remain largely unchanged.

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ADVANTAGES OF PROPOSED REVISIONS TO THE MONTANA BUSINESS CORPORATION ACT

The objectives of the Committee were threefold: (a) to clarify, (B) to modernize, and (c) to simplify the law relating to corporate governance.

The majority of the changes proposed by the Committee are designed to clarify the law. While the Montana Supreme Court, on the whole, has done an admirable job in clarifying the existing statutes, additional clarity in the statutes has several advantages. First, a few of the court cases are outdated and it is uncertain whether the Court would follow the modern trend, if presented with these cases again. Second, attorneys and corporate officials ought to be able to ascertain the law with some certainty by referring to the statute. Finally, the Supreme Court has not had the opportunity to rule on the majority of the ambiguities in the existing statutes, further increasing the uncertainty in existing law.

Among the more significant clarifications in the proposal are:

a) *Derivative Shareholder Suits.* Existing law in Montana does not clearly address the conditions under which shareholders may bring a suit, in the name of the corporation, for damages as a result of actions taken by directors. The proposed revisions provide specific guidance to corporations, attorneys and the courts. See RMBCA §§ 7.40 through 7.47.

b) *Duty of Loyalty.* Existing law providing that director conflict of interest transactions are void or voidable leaves too much to the imagination (and the courts). The proposed revisions provide needed guidance to corporate directors in defining exactly what transactions are conflict of interest transactions and defining the consequences to the parties to those transactions. See RMBCA § § 8.60 through 8.63.

c) *Dissolution.* The ability of injured plaintiffs to recover against the assets of a dissolved corporation is not clear under existing law. In some cases, plaintiffs may be left without a remedy if a product is manufactured before dissolution but causes injury thereafter. The Committee proposes a scheme to protect the interests of injured parties while at the same time protecting the interests of shareholders in winding up the affairs of corporations. See RMBCA §§ 14.06 - 14.07.

d) *Preemptive Rights.* Many corporations elect to provide for preemptive rights (rights of existing shareholders to purchase a prorata amount of any new stock issue) in their Articles of Incorporation. When a corporation elects preemptive rights, it is not always clear when these rights apply. The proposed legislation provides a definition. See RMBCA § 6.30.

e) *Service of Process.* The current statute does not "mesh" well with the Montana Rules of Civil Procedure concerning the issue of service of process on a dissolved corporation. The revisions clarify who may be served. See RMBCA § 5.04.

f) *Housekeeping.* The Committee's proposals, throughout, clarify ambiguities in existing law, eliminate unnecessary technical requirements and provide for maximum flexibility in structuring a corporation. The proposals also clarify existing sections of the law that are difficult to read, and, as such, create traps for the unwary (e.g., indemnification of directors, dissenters' rights). Finally, the proposal modifies the existing laws by using sex neutral language.

In addition, several provisions of the act modernize Montana law relating to corporate governance. In doing so, the legislation affords Montana corporations with the same advantages as businesses incorporated in other states. The legislation, however, balances the rights of those involved in corporate management with the rights of shareholders and creditors. Some of the more significant changes include

a) *Elimination of Needless Formalities.* The proposals seek to simplify corporate governance by eliminating needless formalities. For example, the two-step filing procedure for dissolution has been reduced to one step (*see* § 14.03) and the requirement of two persons acting as corporate officers has been eliminated (*see* § 8.40).

b) *Shareholder Dissension.* The existing statute provides for the draconian remedy of dissolution of a corporation if a court finds majority shareholders oppressing minority shareholders. Oppression has been defined by the courts as violation of the reasonable expectations of shareholders. The Committee, borrowing from a South Carolina statute, recommends adoption of a statute providing that courts have the power to order less drastic remedies, such as court-ordered purchase of shares or injunctions prohibiting certain wrongful acts.

c) *Consideration for Stock.* The proposed legislation changes existing law by allowing corporations to issue stock for any consideration deemed appropriate by the directors, including promissory notes or future services. *See* RMBCA § 6.21.

d) *Dissolution.* The existing law cuts off the rights of injured parties to sue dissolved corporations for damages, even though the applicable statute of limitations may not have expired. It does so, by establishing a special dissolved corporation statute of limitations, which, in effect, supersedes the regularly applicable statute of limitations. The Committee's proposal abolishes the separate statute of limitations for dissolved corporations (whether foreign or domestic), leaving the otherwise applicable (e.g. tort statute of limitations, contract statute of limitations) statute of limitations to control. *See* RMBCA § 14.06.

e) *Increased Flexibility.* The current laws require cumulative voting, affirmative vote of two-thirds of the shareholders to take certain major corporate action and other provisions that, while appropriate for many corporations, are unnecessarily cumbersome for others. The proposal allows shareholders to opt out of these requirements if they so desire. *See, e.g.,* RMBCA §§ 8.24, 10.03, 12.03, 14.03.

f) *Limitation of Director Liability.* Many states allow shareholders to amend articles of incorporation to give directors greater protection from liability to the shareholders or the corporation. The proposal clarifies that shareholders may adopt such limitations unless the directors acted intentionally in inflicting harm on the corporation. *See* RMBCA § 2.02.

g) *Incorporation.* The proposed revisions simplify and clarify the incorporation process. The law reduces the information required in the articles and reduces the amount of review by the Secretary of State (thereby eliminating potential delay). *See* RMBCA §§ 1.25 and 2.02.

The law should be simplified to eliminate needless paperwork and cumbersome computations. As such, the Committee proposes the filing process simplify documents to be filed and eliminate the necessity of the issuance of "certificates" to acknowledge filing. For example, the cumbersome dual filing procedure for dissolution of a corporation has been simplified to require only one comprehensive filing.

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Similarly, the cumbersome requirement of computing initial license fees for both domestic and foreign corporations has been simplified. Now based on the amount of stock issued and the par value of the stock, the fee structure has become a "trap" for the unsophisticated. Those corporations issuing high par value stock pay more fees than those issuing non par stock or low par value. Instead, under the fee scheme proposed by the Committee, the fees are flat fees.

In addition, the language of several provisions of the existing law is cumbersome and difficult for many members of the business community to understand. The statutory sections regarding indemnification and dissenters rights are examples. This language has been simplified. See RMBCA §§ 8.50 and 8.58 and §§ 13.20 through 13.28.

Finally, uniform and standardized filing requirements have been recommended (RMBCA §§ 1.20, 1.21, 1.22 and 1.23).

ADVANTAGES OF PROPOSED REVISIONS TO THE MONTANA NONPROFIT CORPORATION ACT

The law governing nonprofit organizations has not historically received the attention it deserves. Professor Howard Oleck observes: "American society has consisted, to an extraordinary extent, of voluntary associations of persons and organizations not for profit, but for the public good." H. OLECK, *NONPROFIT ORGANIZATIONS AND ASSOCIATIONS* (1980). Approximately 11.5 million people (nationally) serve on the boards of nonprofit organizations. C.N. WALDO, *A WORKING GUIDE FOR DIRECTORS OF NONPROFIT ORGANIZATIONS* xi (1986). Nonprofit organizations employ seven million workers (6% of the work force in the U.S.), contributing \$228.2 billion to the national economy. Reiss, *The Hidden Economy: The Nonprofit Sector*, *MANAGEMENT REVIEW* 49 (July 1989). In addition, 45 percent of all adult Americans act as volunteers for charities, averaging 4.7 hours of contributed time a week. *Id.* at 50. Up-to-date laws for nonprofit organizations, as such, are a must.

The Committee's proposals for the Montana Nonprofit Corporation Act are parallel to its proposals for the Montana Business Corporation Act, except where policy reasons indicate a different treatment. The objectives of the Committee, when revising the Montana Nonprofit Corporation Act, were (a) to clarify, (b) to modernize, and (c) to simplify the law relating to governance of these organizations.

Because of the dearth of court decisions regarding nonprofit corporations, questions that are not addressed in the statute create substantial uncertainty for nonprofit corporations and those who represent them. As such, the Committee proposals *clarify* the following issues that would otherwise be left to the courts:

a) *Increased Flexibility.* The proposal specifically allows self-perpetuating boards, simplifies filing documents with the secretary of state, makes it easier to call and hold meetings, makes it easier to structure an organization with delegates, allows more flexibility in methods of choosing directors, allows directors meetings to be held by phone and generally simplifies corporate governance.

b) *Indemnification.* While Montana law, as it now exists, provides substantial protection to officers and directors of nonprofit corporations against liability, the law is largely silent as to when and how a nonprofit corporation may (or must) reimburse its officers and directors for liability they incur when acting for the corporation. The proposal allows nonprofit corporations substantial flexibility in establishing policies in this regard, while at the same time protecting officers and directors. *See* RMNCA §§ 8.50 - 8.58.

c) *Duty of Loyalty.* Courts carefully scrutinize transactions between nonprofit corporations and their officers and directors for conflicts of interest. The standards, however, are not clearly defined by the courts. As such, the Committee proposes specific conflict of interest rules that balance the need to balance the need to preserve the public perception that nonprofit corporations are worthy of trust, while at the same time allowing those organizations to deal with directors who might also be officers of financial institutions, landlords or other businesses. Directors who act in good faith and meet the other standard of the proposal are protected. *See* § 8.31.

d) *Derivative Actions.* The statute is currently silent as to the ability of a member of the corporation to sue the director derivatively (in the name of the corporation) if they stray from the nonprofit purpose or otherwise mismanage the corporation. The Proposal provides specific standards to limit these actions when the risk of a harassment lawsuit exceeds the public interest in allowing those suits to go forward.

e) *Rights of Members.* The proposal clarifies the rights of members of *mutual benefit associations*, if permitted by articles of incorporation or bylaws, to transfer memberships (for consideration) and receive distributions when a corporation dissolves. Members of religious corporations and public benefit corporations do not have this privilege.

f) *Dissolution.* The abilities of creditors and injured plaintiffs to recover against the assets of a dissolved corporation is not clear. In some cases, plaintiffs may be left without a remedy. The proposal balances the rights of creditors of the dissolved corporation with the necessity for the dissolving organization to wind up its affairs.

g) *Housekeeping.* The Committee's proposals, throughout, clarify ambiguities in existing law, eliminate unnecessarily technical requirements and provide for maximum flexibility in structuring a corporation. For example, the law authorizes the use of delegates. RMNCA § 6.40. It also clarifies the circumstances under which a membership may be purchased. RMNCA § 6.22.

h) *Terminations of Membership.* Whether a member may be expelled or terminated is now left to the courts. The proposal contains specific provisions as to how a nonprofit corporation may expel a member without fear of liability. RMNCA § 6.21.

In addition, the proposals adopt a growing trend in the law treating mutual benefit corporations, religious organizations and public benefit corporations differently. To fail to distinguish this is to force a square peg into a round hole. Under the proposal, each newly formed nonprofit corporation must choose between designation as a public benefit, mutual benefit or religious corporation. Existing nonprofit corporations may choose a designation before 1995. The Committee's proposal recognizes the difference between these different types of nonprofit corporations:

a) *Public Benefit Corporations* are those corporations operating for public or charitable purposes. As such, members may not sell their interest or receive distributions from the organizations. Because members of public benefit corporations have little economic interest in their corporations, they usually do not carefully monitor activities to prevent corporate abuse. The Committee's proposal addresses this problem by increasing the statutory authority of the Attorney General to monitor these organizations.

b) *Mutual Benefit Corporations* are organizations such as trade associations, social clubs, and fraternal organizations designed to benefit their members. Members, as such, are given broader voting rights. Members, while not entitled to receive distributions while the organization is operating, will be entitled to sell their memberships and receive distributions when the organization dissolves.

c) *Religious Corporations* are treated under the proposal in a way similar to public benefit corporations. For constitutional and public policy reasons, however, the proposal allows more flexibility in the governance of these organizations. Similarly, the power of the Attorney General to oversee a religious corporation is limited.

Self designation by nonprofit corporations has the advantage of eliminating the uncertainty of courts making an inappropriate designation. Courts, when deciding such issues as the property rights of members, of course, are already forced to categorize nonprofit organizations when deciding such issues as the property rights of members. H. OLECK, *NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS* § 266 (1980).

Finally, just as the RMBCA eliminates unnecessary complexity in the laws governing business corporations, the RMNCA eliminates unnecessary complexity in the laws governing nonprofit corporations.

OTHER RECOMMENDATIONS

The Committee, in the Exposure Draft, proposed clarifying the applicability of the corporate statutes to banks incorporated under Title 32, Chapter One of the Montana Code Annotated. Specifically the Committee proposed that MCA § 32-1-112 be amended to extend the benefits of the general corporate statute to banks, except where the corporate statutes conflict with banking laws. The Idaho legislature, for example, has taken this action. While the Committee was generally in favor of the approach, it agreed not to pursue the approach unless it received affirmative support from the banking community. The Committee dropped the proposed clarification because of lack of interest from the banking community.

The Committee also proposes to create a streamlined procedure to enable businesses to claim that another business' subsequent registration of a name with the secretary of state creates confusion, mistake or deception among the public. The current procedure to make such a showing is burdensome and expensive. The legislation also clarifies the standards to determine whether a name is confusing.

The Committee discussed the appropriateness of making a recommendation concerning change in control (also known as "anti-takeover" legislation). In light of the controversy surrounding that issue and the Committee's heavy work load, the Committee thought it inappropriate to address the issue. Committee members, however, prepared reports available to those interested describing the pros and cons of such legislation.

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

Business & Econ Dev.

COMMITTEE

BILL NO. HB 552DATE Feb. 13, 1991

SPONSOR(S)

Rep. Crowley

PLEASE PRINT

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NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
BOB MURDO, HELENA	ST. BAR CORPORATE LAW COM.	552		X
Robert (Jack) Michelotti, Bldg	✓ ✓ ✓	552		X
Mila Zimmerman Butte MT	MPG	61		X
Bob Ryper Helena	St Bar Corporate Law Comm.	552		X
Katharine Donnelly	MHN	552		X
Garth Jacobson	Sec of State	552		X
Allen Chronister	State Bar	552		X
Steven C Bahls	State Bar Corp Law Revision	552		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS
ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

EXECUTIVE ACTION ON HOUSE BILL 499

Discussion: REP. BACHINI reminded this was REP. WYATT's bill to exempt realtors who have been licensed for ten years or more from the continuing education program.

Motion/Vote: REP. STELLA JEAN HANSEN moved HB 499 be TABLED. Motion carried with all members voting AYE except REP. WALLIN who was not present and REPS. DOWELL AND BACHINI voting NO.

EXECUTIVE ACTION ON HOUSE BILL 552

Motion/Vote: REP. DON LARSON moved HB 552 Do Pass. Motion carried unanimously.

HEARING ON HOUSE BILL 590Presentation and Opening Statement by Sponsor:

REP. JIM SOUTHWORTH, HD 86, Yellowstone County, Billings, sponsor said HB 590 is an act requiring insurers to obtain proof from insureds prior to issuing an insurance policy on a newly constructed building or building to be constructed that the insureds have obtained or applied for required construction permits. Proponents will explain in more detail.

Proponents' Testimony:

Ron Burke, Yellowstone County, supports HB 590 because it is a simple and economically feasible way for the state to ensure that their state laws and building codes are upheld. The enforcing inspectors have areas of more than 200 square miles to cover, and when a permit is not obtained the inspectors have to physically see they do not have permits. There are instances of people who are not making sure these buildings are up to codes, in turn get insurance, and if that building burns or is damaged otherwise because it was not built up to codes, the insurance company pays them the same as anyone else, and the people building to code requirements are having to bear the costs of the poorly built ones through raised insurance premiums. He is in favor of this bill.

Ron Pering, IBEW, said anyone wanting insurance on a building just has to ask to have it inspected. The intent of this bill is to require permits be obtained so inspectors can know when a new building is being erected and can inspect it properly. This will keep insurance costs down and not spread the load to those builders obtaining permits. This will just put some teeth into the codes.

Gene Fenderson, representing the Montana State Building Construction Trade Union, rose in support of HB 590. One of the things the construction industry is trying to pass this year is

HOUSE OF REPRESENTATIVES

BUSINESS AND ECONOMIC DEVELOPMENT COMMITTEE

ROLL CALL

DATE Feb. 14, 1891

[illegible]

MINUTES

MONTANA SENATE 52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on March 18, 1991,
at 10:00 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: John Harp (R)

Staff Present: Valencia Lane (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion: The hearings of HB 552 and HB 741 were combined.

HEARING ON HOUSE BILL 191

Presentation and Opening Statement by Sponsor:

Representative Bruce Measure, District 6, said the bill is an act adopting the uniform conflict of laws which provided for a method of determining the applicable statute of limitations when other state laws are involved in a civil proceeding in Montana; and amending Section 27-2-104, MCA. He said Senator Mazurek would carry HB 191.

Representative Measure said he believed HB 191 was quite straight forward, and asked that the Committee review it. He stated that he didn't believe there were any proponents or opponents of HB 191.

addressed, and said this may be a problems for the next Legislative Session to address. He thanked for the hearing, and asked that Senator Halligan carry the bill.

HEARING ON HOUSE BILL 552

Presentation and Opening Statement by Sponsor:

Representative Brent R. Cromley, District 94, said HB 552 generally revises Montana business corporation law. He stated that the bill should not to be taken lightly, as it has been almost two years in the making. Representative Cromley explained that Gary Spaeth, former President of the State Bar of Montana, appointed a committee who worked hard on this issue, using current statutes and the Revised Model Business Corporation Act.

Proponents' Testimony:

Professor Steven Bahls, University of Montana School of Law, submitted a copy of the State Bar's Committee on Corporate Law Revision Suggested Revisions in the Montana Business Corporation Act (MCA, Title 35, Chapter One) and the Montana NonProfit Corporation Act (MCA, Title 35, Chapter Two) dated October 24, 1991 (Exhibit #2), and read from prepared testimony in support of HB 552 (Exhibit #3). He also submitted a copy of the Executive Summary, HB 552, State Bar of Montana, Corporate Law Revision Project (Exhibit #4).

Robert Michelotti, Jr., attorney, Crowley, Haughey, Hanson, Toole & Dietrich law firm, Billings, said he served on the Corporate Law Revision Committee, and also on the Trust Law Revision Committee, of the State Bar of Montana, but is not a regular participant in the legislative process. He noted that, as a practitioner, the trust law revisions are something that Montanans can all be proud of, as they provide clear and concise guidelines with respect to the operation of corporations.

Mr. Michelotti stressed that the new law does provide some clear guidance with respect to director's and officer's liability. He said the number of directors, can be changed up to 30 percent, and that the bill retains shareholder rights, thus, basically, retaining the number of directors. Mr. Michelotti stated that the law provides the procedure for resignation and removal of directors and officers, and for electronic (tele-conference) meetings. He further explained that it also provides for the use of committees which is common in this day and age, and gives clear guidance as to the standards of conduct governing the directors in conflicts of interests. He thanked the Committee, and urged them to act positively toward HB 552.

Robert Murdo, Vice Chairman, Corporate Law Revision Committee, State Bar of Montana, and attorney, Jackson, Murdo & Grant law firm, Helena, advised the Committee that, in 1982 he worked on this

committee, who made major revisions, and finally American Bar Association's recommendations. He advised the Committee that this law impacts small business corporations, especially businesses that are familiar in Montana. He stated that, under the present law, the usual way in which people obtain stock is by paying money, but that doesn't always happen (Section 38 of the bill).

Mr. Murdo told the Committee that HB 552 changes the law to allow consideration for stock, rather than money, and that it authorizes other consideration as being appropriate (future services, contracts for future services, or promissory notes). He explained that the directors then determine when the stock is to be delivered, and how it is to be restricted, providing added ability for corporations to work with people that have good ideas, but may not have any immediate money to put into the corporation.

Mr. Murdo reiterated the example provided by Professor Bahls. He stated that when shareholders are deadlocked, there is no way to resolve that deadlock, and the only thing existing law does is dissolve the corporation. Mr. Murdo advised committee members that the Montana Corporate Law Revision Committee decided to use South Carolina law, and reviewed other options that they could give to the court (see Options in Section 155).

Mr. Murdo further advised that the courts are still authorized to order dissolution when shareholders are in a deadlocked, but would also have other remedies under this bill, (such as changing provisions of the Articles of Incorporation, the By-Laws, prohibiting certain acts of shareholders or directors, and providing for the purchase of shares by the corporation). Mr. Murdo said the Corporate Law Revision Committee tried to build flexibility into HB 552, to keep corporations operating within the law, and to provide some flexibility for Montana businesses. He thanked the committee for their consideration, and urged them to pass HB 552.

Bruce MacKenzie, attorney, Dorsey & Whitney law firm, Great Falls, and member of the Corporate Law Revision Committee of the State Bar of Montana, said flexibility is one of the hallmarks that attempted in the revisions. He noted that the Committee did not make wholesale revision of the code, because it wanted to be sensitive to Montana's history with corporate law, and, simultaneously, provide that flexibility.

Mr. MacKenzie Cited retention of voting requirements, as an example. He said Montana has had cumulative voting since 1889 when the Constitution was adopted. He further stated that when the Constitution was revised in 1972, the voting requirement was deleted from the Constitution, but it continued to be a part of the fabric of corporate law in this state both under statute and in case law.

Mr. MacKenzie stated that cumulative voting is a protection from minority interests, and that those who would oppose cumulative

voting see it as an opportunity to remove management that is not responsive to minority interests. He commented that opponents of cumulative voting say that the minority is held under control, but the real problem exists in terms of large public corporations.

Mr. MacKenzie further stated that cumulative voting is a problem in that the process is complicated and costly. He said public companies felt that this was an opportune time to make revisions that would allow those corporations to opt out of cumulative voting. He explained that, thus, they could continue to protect the minority interests of Montana, yet provide purchasing power flexibility via alternative methods of buying stock. Mr. MacKenzie thanked the Committee, and urged the adoption of HB 552.

Garth Jacobson, Office of the Secretary of State, and member, Corporate Law Revision Committee, State Bar of Montana, said the bill impacts the way the Secretary of State's office interacts with businesses in the state. He assured the Committee that the focus of his participation was toward minimizing the red-tape that businesses experience in the state.

Mr. Jacobson told the Committee he believes that HB 552 makes it easier to do business in Montana, particularly filing of documents with the Secretary of State's office. He explained that the two-part process for dissolving a corporation would be eliminated, and that, but the fees remain, generally, the same, and are revenue neutral.

Mr. Jacobson further advised the Committee that the Corporate Law Revision Committee eliminated the convoluted language that makes it difficult to understand the fee structure. He explained that it is a system whereby one would pay "x" amount of fees according to the number of shares that will be issued, and is very simple. Mr. Jacobson further explained that it does not tie into the concept of par value where there is a formula analysis, and that people will know up front what the fees and license fee will be. He said a foreign corporation will simply pay a flat fee, as there seems to have been a lot of confusion with foreign corporations who want to receive a certificate of authority.

Mr. Jacobson further stated that the standard for filing a corporate name from "deceptively similar" will be changed to a system called "distinguishable on the records". He said that if the name on the record can be distinguished, then it can be filed. He said Section 181 addresses using a name for unfair advantage, and that the service of process is also addressed here.

Mr. Jacobson further advised the Committee that there is some ambiguity when a corporation is involved, or dissolved, as to who the service of process is to be made against, and that HB 552 specifically designates who the trustees of that dissolved corporation are for the purpose of service of process. He explained that it also gives the corporation that dissolves the opportunity to designate a person for process services. Mr.

Jacobson thanked the Committee, and recommended that HB 552 be concurred in.

Robert C. Pyfer, attorney, and member of the Corporate Law Revision Committee, State Bar of Montana, said that Committee went through a very deliberate, open process, and that HB 552 is a good product. He thanked the Committee, and urged their consideration of HB 552.

Allen Chronister, State Bar of Montana, said the State Bar was responsible for the initiation of this work. He thanked the Committee, and urged them to concur on HB 552.

Opponents' Testimony:

There were no opponents of HB 552.

HEARING ON HOUSE BILL 741

Representative Cromley advised that the HB 552 and HB 741 are very closely related with the same thought process and committee work involved.

Professor Steven C. Bahls, University of Montana School of Law, asked the Committee to support HB 741.

Robert C. Pyfer, attorney, and member of the Corporate Law Revision Committee, State Bar of Montana, alluded to the three kinds of non-profit organizations which are the issue of this legislation. He stated that for-profit business corporations, still have the same basis, and are owned and controlled by their investors for the purpose of returning a profit to those investors. Mr. Pyfer went on to state that non-profit organizations don't always have the exact common thread, as some are charitable organizations, or serve a public cause or good. He said these organization are not only tax exempt, but contributions to them are deductible on individual tax returns.

Mr. Pyfer told the Committee that religious corporations are very much like charitable organizations, except that they have separate constitutional status, because of the separation of church and state and the free exercise of religion clauses in our Constitution. He said the third is the mutual benefit organization which serves a limited membership, and is run by volunteers, as well as tax exempt. He explained that contributions to mutual benefit organizations are not deductible, and they may have equity memberships which can be transferred for consideration. Mr. Pyfer said they are also entitled to distribution on dissolutions.

Mr. Pyfer explained that there are some market differences from different types of organizations. Mr. Pyfer commented that it's absolutely impossible to have clarity in the law, and not

Questions from Committee Members on House Bills 552 and 741:

Chairman Pinsoneault commented that there is real potential for fraud, and said he was involved in a situation where a member of a particular congregation, whom he knew, had the standing to go ask for an accounting from a pastor. He said there was great reluctance to make this matter public. Mr. Michelotti asked Professor Bahls to follow up. Professor Bahls stated that he came from a church in Wisconsin where there was a similar problem, and said there are real competing considerations in dealing with religious corporations.

Professor Bahls explained that the state grants them a charter as a non-profit corporation, and expects them to follow the rules (not to use personal phones to benefit employees, or a board of directors, or a governing body). He said they also have the constitutional consideration of avoiding excessive entanglement. He further stated that the problem could be addressed by clarifying the rights of the members, and giving them the authority to seek the assistance of the Attorney General with respect to fraud. He explained that the Attorney General must go into court, in such an instance, but cannot get involved in an intra-church dispute which is a policy disagreement.

Senator Pinsoneault commented that the bill makes it easier for corporations to bring family members in to become shareholders, asked if the sponsors might be creating a nepotism problem that could come back to haunt them. Professor Bahls replied he didn't think so, and said this issue has been debated in American corporate law over a period of time.

Professor Bahls further explained that if the shareholders and board of directors decide, in fact, to concur that to the power, shareholders conferring it on to the board, and the board deciding that it is in the best interest of the corporation to allow family members to enter without a financial contribution, it would be permitted. He commented that if the board of directors is giving away stock for services that will never be rendered, they may have some liability there.

Senator Halligan asked Professor Bahls to touch on Subchapter S corporations and all the general business corporations. Professor Bahls responded that the flexibility that corporations currently have with respect to making an S corporation exemption is unchanged.

Senator Halligan asked if the direction would lead to forms available to use from the Secretary of State's office. Professor Bahls said an attorney is still advisable for incorporation, but it is possible to incorporate without one. He advised the Committee that the American Bar Association, has model forms which non-attorneys can use to incorporate, but there is some risk that the appropriate modifications will not be made. He said incorporation on the non-profit side, makes it much more advisable to get an

attorney because of the tax considerations, but, again, it is impossible to incorporate without an attorney.

Closing by Sponsor:

Representative Cromley told the Committee that he felt it was difficult to consider two large bills, and to try to have a full understanding of them. He reminded the Committee of the amount of study that has gone into them, and thanked them for their consideration. He asked that Senator Mazurek carry the bills.

HEARING ON HOUSE BILL 272

Presentation and Opening Statement by Sponsor:

Representative Bradley, District 79, said HB 272 creates the Montana Community Corrections Act, authorizing local governments and private agencies to establish and operate community corrections facilities and programs, and providing for creation of community corrections boards. She stated that the bill allows sentencing courts to sentence non-violent felony offenders to a community corrections facility or program, and grants the Department of Institutions authority to adopt rules governing operation of community corrections facilities and programs. Representative Bradley further stated that the bill establishes penalties for offenders who escape from community corrections facilities, and authorizes placement of offenders in a community corrections facility or program as a condition of the deferred imposition or suspended execution of sentences.

Representative Bradley said the bill was endorsed by the Criminal Justice Corrections Advisory Council, and that she tried to pass a similar bill four years ago. She stated that the Legislature can't build itself out of the prison population crisis, and said the bill provides for correction services at the local level for both governmental or non-governmental agencies. She told the Committee that no violent crimes or sexual offenders could apply, and that local boards must be established to organize and overview the system. She stated the boards would include judges, county attorneys, and mental health, probation and parole professionals, and that the agencies would apply to the boards for approval.

Representative Bradley further advised the Committee that the second concept would allow judges to order placement of non-violent offenders into community corrections, but not for longer than one year. She said the Department of Institutions has rulemaking authority, and will evaluate the different proposals, as well as make reimbursement.

Representative Bradley said the fourth concept deals with defendants who actually contract with the agency, and work off specific obligations during their term, such as paying for part of

Closing by Sponsor:

Representative Bradley requested that Senator Doherty carry HB 303, and that Senator Pinsoneault carry HB 272., and made no closing comments.

EXECUTIVE ACTION ON HOUSE BILL 741

Motion:

Senator Mazurek will carry the bill. Senator Crippen made a motion that HB 741 BE CONCURRED IN.

Discussion:

There was no discussion.

Amendments, Discussion, and Vote:s

There were no amendments.

Recommendation and Vote:

The motion made by Senator Crippen carried unanimously.

EXECUTIVE ACTION ON HOUSE BILL 552

Motion:

Senator Crippen made a motion that HB 552 BE CONCURRED IN.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

The motion made by Senator Crippen carried unanimously.

EXECUTIVE ACTION ON HOUSE BILL 471

Motion:

Senator Halligan made a motion that HB 471 BE CONCURRED IN.

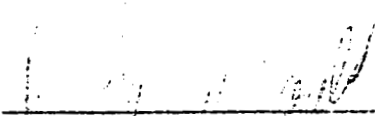
Discussion:

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
March 18, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 552 (third reading copy -- blue), respectfully report that House Bill No. 552 be concurred in.

Signed: 
Richard Pinsoneault, Chairman

191 S-1-71
Amd. Coord.

SB 3/18 12:30
Sec. of Senate

24. 2
18 Mar. 91
HB 552

CORPORATE LAW REVISION COMMITTEE

STATE BAR OF MONTANA



SUGGESTED REVISIONS

IN THE

MONTANA BUSINESS CORPORATION ACT

(MCA TITLE 35, CHAPTER ONE)

AND THE

MONTANA NONPROFIT CORPORATION ACT

(MCA TITLE 35, CHAPTER TWO)

* * * * *

October 24, 1990

Steven C. Bahls, Reporter

Exhibit 2 consists of a 268-page study. The original is available at the Montana Historical Society, 225 North Roberts, Helena, MT 59601. (Phone 406-444-4775)